

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD L. TORRES
Claimant

VS.

WOODMASTERS, INC.
Respondent

AND

STATE FARM FIRE & CASUALTY COMPANY
Insurance Carrier

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Docket No. 1,058,973

ORDER

Respondent and its insurance carrier (respondent) request review of the September 24, 2012, Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Denise E. Tomasic, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the stipulations and considered the record presented to the ALJ. The record consists of the Deposition of Ronald Torres, taken January 24, 2012; the Transcript of the April 6, 2012, preliminary hearing, with attached exhibits; the Transcript of the September 21, 2012, preliminary hearing, and the documents of record filed with the division.

ISSUES

The ALJ found claimant suffered an accidental injury, that the injury did arise out of and in the course of claimant's employment, that the accident was the prevailing factor in

causing the injury and current need for treatment, that claimant gave timely notice of the injury, and that claimant and his witnesses were credible.

Respondent appeals arguing that not only did claimant's knee injury not arise out of and in the course of his employment, but that claimant failed to give timely notice of the alleged injury. Therefore the ALJ's Order should be reversed and claimant denied compensation.

Claimant argues the Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent in September 2010 after being referred by A-1, a temp service. Claimant worked as a temporary laborer for three weeks with respondent. He was hired to perform interior work installing cabinetry, countertops, and doors among other things. Claimant's supervisor was J. Kurt Johnson, the owner of Woodmasters.¹ Woodmasters has been in business for 42 years. Mr. Johnson testified his company subcontracts interior woodwork and cabinet settings for commercial projects.

Claimant testified that he and Mr. Johnson were a two-man crew on an apartment complex job at Broadview Towers in Emporia, Kansas. Claimant stopped working for respondent through the temp service after three weeks because the first phase of the work was completed. Claimant was contacted seven weeks later by Mr. Johnson, and was asked to work directly for respondent on a part-time basis working on specific jobs. Claimant accepted the offer and worked directly for respondent three weeks on and six weeks off through five phases of the project and to November 19, 2011, on other projects. At some point, the construction project moved to a location in Lawrence, Kansas. This was new construction rather than the remodeling construction at Broadview Towers.

Claimant testified he was paid \$15 an hour on commercial projects and agreed to be paid \$12 an hour on residential projects, with the other \$3 going towards his expenses for out of town jobs. Claimant later found out that he was only making \$10 an hour because \$3 was not covering his expenses. Claimant testified that about two and half weeks into working, Mr. Johnson brought in two more experienced workers at \$90 an hour to install baseboard on the fourth level of the job site.

¹ Mr. J. Kurt Johnson is identified at various times in this record and in this Order as Kurt, Curtis and Mr. Johnson.

At the Lawrence job site, a company identified as Pro-Build was to deliver the raw materials including doors, baseboards, trim and casing. The contractor, First Management, was to stock the various units with the materials. However, claimant contended that First Management's crew was not knowledgeable enough to place the right materials at the right spot, so he and Kurt would have to move the materials into the proper unit.

Claimant alleges that he injured his left knee on November 19, 2011, while carrying a heavy door up some stairs while working for respondent. Claimant testified that the door weighed 150 pounds. Claimant testified that he had carried six doors that day.² Claimant reported to Mr. Johnson, that he felt he had messed up his knee carrying a door and was told to walk it off. The next day, claimant's knee was swollen, but he continued to work because he was told he would be replaced if he couldn't do the job and claimant needed the money.

Claimant continued to work until November 23, 2011, and continued to complain to Mr. Johnson of pain in his knee and of difficulty getting out of bed. Claimant even asked if he should go to the hospital and again he was told to walk it off. He testified that Mr. Johnson was concerned about getting the job done and not about his injury.

Claimant testified that he had to create a makeshift brace out of one of his socks to provide support for his knee while he worked. Claimant never filled out an accident report or gave Mr. Johnson anything official saying he hurt his knee. He decided to try and work through the pain because the Thanksgiving holiday was coming and he knew he would get a break. Claimant testified that a lot of people on the job saw him struggling, but no one did anything about it.

Claimant contacted Mr. Johnson on November 28, 2011, to let him know that his knee was worse and he wanted to see a doctor to make sure there was nothing seriously wrong because he could barely walk. Claimant went to the doctor at Flint Hills Medical Center and met with Diane Wrenn, a nurse practitioner, that same day. This was the first time claimant reported his knee injury to a doctor. He reported to Ms. Wrenn that he injured himself walking up some stairs. He didn't indicate the accident occurred at work, but instead reported it was at home. Claimant did this because Curtis told him that he would take care of the bills. Claimant was not given any workers compensation information at that time. When Ms. Wrenn examined claimant, she felt that he might have a blood clot in his kneecap and sent him to the emergency room for x-rays and blood work.

Claimant called Mr. Johnson on the way to the emergency room to let him know what was going on and was told to just let them look at the knee, but not to do anything and the bill would be taken care of. Mr. Johnson didn't want workers compensation involved, but he didn't specifically tell claimant not to say it wasn't work-related. Claimant

² At the April 6, 2012 Preliminary Hearing claimant stated the door weighed 100 pounds.

testified that he didn't know what to say to the medical staff for the purposes of a workers compensation claim, so that is why the medical records indicate that he hyperextended his knee at home, even though that wasn't the case.

At the Newman Regional Health emergency room, claimant had x-rays of the knee and blood drawn to rule out a clot. The notes from the November 28, 2011 emergency room exam indicate claimant was walking up steps on 11/22/11 and "knee went back-hyper extended, at home. Lt. knee pain and swelling."³ The emergency room records also indicate claimant's knee pain has worsened, with swelling "since yesterday".⁴ The tests came back negative for blood clots and fractures, but he did have some torn ligaments. Claimant was given an immobilizer, crutches, and pain medication, and was told to stay off the leg for at least seven to 10 days and to follow-up with Dr. Yost. Claimant was unable to return for a follow-up appointment. It was three weeks before he could walk on his leg without pain and without re-injuring his knee. Claimant testified that the original swelling went down to his toes. When claimant reported to Mr. Johnson he was going to need to see an orthopaedist, he was told to pick up his belongings because he was being replaced.

The day after claimant sought medical attention he was notified that he was being terminated and he needed to come in and collect his belongings. It was two and a half weeks before claimant could walk on the knee "secure enough without pain without injuring it again".⁵ Claimant has not sought medical attention since. If claimant sits in one place for too long his leg will shake. He also can't walk for long distances. The pain in his knee is in the bottom front and does not occur everyday.

Mr. Johnson testified that claimant was hired to perform interior trim work. He also testified that the workers he hired were not responsible for bringing the doors from one floor to the other. That was the responsibility of the general contractor's laborers who stored all of the doors on the second floor.

Mr. Johnson testified that he was working alongside claimant on the job in which claimant is alleging he was injured and denies claimant reported any accident or injury at any time in November 2011. He also denies telling claimant to walk off any pain he had in his knee. He testified that there was no way claimant was carrying doors to the fifth floor because they had already been delivered to the floor and been totally trimmed. He and claimant were laying base on November 19 and 20, 2011.

³ P.H. Trans. (Apr. 6, 2012), Resp. Ex. A at 1.

⁴ *Id.*, Resp. Ex. B at 5.

⁵ Claimant's Depo. (Jan. 12, 2012) at 34.

During this job claimant and Mr. Johnson were living in a hotel room together. Mr. Johnson never observed claimant having any problems with his knees other than the standard aches and pains of the workload. Claimant never asked for help with his work because of any physical problems. Mr. Johnson had no idea that claimant was claiming to be injured on the job when claimant sought medical attention on November 28, 2011. Mr. Johnson also denies telling claimant he would take care of his medical bills. Mr. Johnson claims he first learned of claimant alleging a work-related injury on December 24, 2011, when he received a letter from claimant's attorney.

Claimant's mother, Florence Torres, testified that she drove claimant to the hospital on November 28, 2011, and on the way claimant called Mr. Johnson and reported that he was on his way for some x-rays to check for blood clots in his knee. She doesn't recall claimant reporting over the phone how he injured his knee.

Claimant's girlfriend of eight years, Sheila Culbert, testified at the preliminary hearing on September 21, 2012, that on November 19, 2011, she traveled to Lawrence to visit claimant and see her mom and sister in Leavenworth, Kansas. She noticed that claimant was hurting and he told her that he had injured his knee carrying doors up the stairs. Ms. Culbert testified that claimant's employer, Curtis Johnson was present when claimant was explaining to her how he was injured. Ms. Culbert stated that Mr. Johnson was rubbing some form of medication on claimant's knee. Mr. Johnson denies claimant's girlfriend was present in their motel room on November 19, 2011, and denies ever touching claimant's knee.

The next day, November 20, 2011, claimant's knee was swollen and they discussed going to the hospital. According to Ms. Culbert, Mr. Johnson was present and said to give it a few days because Thanksgiving was coming up and they would be getting some time off. After Thanksgiving, when claimant's knee wasn't better he inquired about going to the hospital. He was told to go ahead, but was told not to say it was work-related and Mr. Johnson would take care of it. Ms. Culbert testified that claimant repeatedly told Mr. Johnson that his knee injury was work-related. Ms. Culbert was present at the preliminary hearing on April 6, 2012, but did not testify at that time.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp 44-501b states:

- (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
- (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational

disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

(d) Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury, whether by accident, repetitive trauma, or occupational disease, for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer.

K.S.A. 2011 Supp 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Several issues are presented to the Board in this matter. Whether claimant suffered an accident, whether that accident arose out of and in the course of his employment with respondent, whether the accident is the prevailing factor causing the injury and whether timely notice of the alleged accident was provided to respondent.

All of the listed issues depend directly on the credibility of the claimant and the witnesses who testified in this matter. Did claimant carry a door weighing 100-150 pounds up three flights of stairs on November 19, 2011, while working for respondent? Did claimant injure his knee while carrying the door or while walking on stairs at home? Did claimant tell Mr. Johnson, his supervisor and respondent owner of the knee injury? Was claimant's girlfriend at the motel in Lawrence, Kansas on November 19th when claimant allegedly told Mr. Johnson of the accident and requested medical treatment? Was claimant encouraged by Mr. Johnson to misrepresent how the accident occurred in order to avoid workers compensation litigation?

The testimonies of claimant, Ms. Culbert and Mr. Johnson conflict on almost every key issue. Either their memories are extremely fragile or the truth has been severely bruised. Either way, it is difficult to satisfy a factfinder's questions without a determination that a witness or witnesses either lack credibility or are more credible than others. Here, the ALJ did just that. While awarding benefits, he specifically commented on the credibility of claimant and his witnesses.

The Board will, at times, give credence to the determination by an ALJ as to witness credibility, given an ALJ's opportunity to observe live testimony in court. Here the ALJ had the opportunity to see claimant, Mr. Johnson, claimant's mother and his girlfriend during the actual testimony. His assessment of their believability is persuasive to this Board Member. Therefore, this Board Member finds that the award of benefits in this matter should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving that he suffered an accidental injury on November 19, 2011, while working for respondent, the accidental injury did arise out of and in the course of his employment, the accident was the prevailing factor causing the injury and current need for medical treatment and notice was timely given.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated September 24, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
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Brad E. Avery, Administrative Law Judge

⁶ K.S.A. 2011 Supp. 44-534a.